



NUCLEAR ENERGY INSTITUTE

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Vice President, General Counsel and Secretary

November 29, 2010

**SENT VIA ELECTRONIC DOCKET  
(Docket ID No. NRC-2010-0075)**

DOCKETED  
USNRC

November 30, 2010 (4:30pm)

Ms. Annette Vietti-Cook  
Secretary, U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
ATTN: Rulemakings and Adjudications Staff

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

Dear Ms. Vietti-Cook,

The Nuclear Energy Institute (NEI)<sup>1</sup> is pleased to provide these comments on the Notice of Proposed Rulemaking published in the *Federal Register* on July 27, 2010.<sup>2</sup> NEI supports the NRC's efforts to apply the philosophy underlying its 2007 Limited Work Authorization final rule (LWA rule)<sup>3</sup> in regulating the construction of fuel cycle and materials facilities licensed pursuant to 10 C.F.R. Parts 30, 36, 40, and 70. NEI believes that the redefinition of construction, consistent with the NRC's statutory authority, will appropriately focus the agency's regulatory framework and provide greater flexibility to fuel cycle and materials applicants. NEI's detailed comments on the proposed rule are included in the enclosure to this letter.

While NEI generally supports the NRC's efforts to consistently define construction, the approach taken in this rulemaking leaves substantial uncertainty regarding how construction of specific fuel cycle and materials facilities will be regulated. Unlike the LWA rule - which identified specific activities that constitute construction, as well as those that do not<sup>4</sup> - the proposed rule simply imports the statutory "reasonable nexus" standard into the subject regulations.<sup>5</sup> That is, although the proposed rule identifies specific activities that *would not* constitute construction under Parts 30, 40, and 70, it does not apply the reasonable nexus standard to affirmatively identify those construction activities that have a reasonable nexus to protecting the public

<sup>1</sup> NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear material licensees, and other organizations and individuals involved in the nuclear energy industry.

<sup>2</sup> *Licenses, Certifications, and Approvals for Material Licensees*, Proposed Rule, 75 Fed. Reg. 43,865.

<sup>3</sup> *10 CFR Parts 2, 50, 51, 52, and 100 Limited Work Authorizations for Nuclear Power Plants*; Final Rule, 72 Fed. Reg. 57,416 (Oct. 7, 2007).

<sup>4</sup> See 10 CFR § 50.10(a).

<sup>5</sup> See 75 Fed. Reg. 43,865, 43,872-43,875 (July 27, 2010).

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health and safety and common defense and security and, thus, *would* constitute construction. In order for the proposed rule to be effectively implemented, construction must be affirmatively defined for specific classes of materials facilities in a more precise manner. Thus, if the Commission decides to finalize the proposed rule, NEI requests that the agency address how and in what context (*e.g.*, guidance) it plans to provide such a definition for the classes of materials and fuel cycle facilities covered by the proposed rule.

Although the affirmative definition of construction offered in the proposed rule is vague, the proposed rule does explicitly identify specific activities that *would not be* considered construction by the NRC when licensing facilities under Parts 30, 40, and 70. In this way, the proposed rule offers fuel cycle and materials applicants additional flexibility by allowing them to conduct those activities prior to completion of the NRC's environmental review and issuance of the underlying license. Thus, notwithstanding NEI's concerns regarding the vagueness of the affirmative definition of construction included in the proposed rule, we recommend several modifications to the proposed rule language, which we believe are necessary to: (1) more accurately reflect the NRC's limited statutory authority to license construction of the wide variety of facilities covered by the rule, and (2) ensure consistency with the regulatory framework promulgated in the 2007 LWA rule and avoid unnecessary ambiguity associated with the term "commencement of construction." Further, as described more fully in the enclosure to this letter, NEI continues to believe that an LWA-like process allowing applicants to undertake limited construction activities should be included in the regulatory framework governing the licensing of fuel cycle and materials facilities.

If you have any questions concerning these comments please feel free to contact Jerry Bonanno ([jxb@nei.org](mailto:jxb@nei.org), 202-739-8147).

Very truly yours,



Ellen C. Ginsberg

Enclosure

cc: Stephen Burns, General Counsel, U.S. NRC  
Bradley Jones, Assistant General Counsel for Reactor and Materials Rulemaking, U.S. NRC  
Tracey Stokes, Office of the General Counsel, U.S. NRC

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**I. Introduction**

As explained in the cover letter accompanying this enclosure, NEI believes that construction must be affirmatively defined in a more specific manner in order for this rule to be effectively implemented. If the Commission decides to finalize the proposed rule, the NRC should provide an explanation of how and in what context the definition of construction will be clarified (*e.g.*, guidance). Notwithstanding this concern, NEI recommends several modifications to the proposed rule language, which we believe are necessary to: (1) more accurately reflect the NRC's limited statutory authority to license construction of the wide variety of facilities covered by the rule (see Section II below) and (2) ensure consistency with the regulatory framework promulgated in the 2007 Limited Work Authorization final rule (LWA rule)<sup>1</sup> and avoid unnecessary ambiguity associated with the term "commencement of construction" (see Section III below). Further, as described in Section IV, NEI continues to believe that an LWA-like process should be included in the regulatory framework governing the licensing of fuel cycle and materials facilities.

**II. The Proposed Rule Fails to Acknowledge that the NRC has Limited Statutory Authority to License Construction of Materials and Fuel Cycle Facilities**

One of the fundamental issues addressed in the Commission's LWA rule was how to define construction activities that would require prior approval from the NRC in the form of an LWA, construction permit, or combined license. But before considering revisions to the definition of construction, the Commission first addressed the threshold question of whether it had statutory authority to license the construction of nuclear power reactors in the first instance. Specifically, the Supplementary Information published with the LWA rule states:

Section 101 of the AEA prohibits the manufacture, production, or use of a commercial nuclear power reactor, except where the manufacture, production, or use is conducted under a license issued by the NRC. While construction of a nuclear power reactor is not mentioned in Section 101, Section 185 of the AEA requires that the NRC grant construction permits to applicants for licenses to construct or modify production or utilization facilities, if the applications for such permits are acceptable to the NRC. However, the term construction is not defined anywhere in the AEA or in the legislative history of the AEA.<sup>2</sup>

So, in promulgating the LWA rule – which this proposed rule seeks to emulate – the NRC properly addressed the threshold question of whether it had statutory authority to license construction of the facilities at issue – *i.e.*, nuclear power reactors. It was only after affirmatively answering this question that the Commission went on to redefine construction through application of the "reasonable nexus" rubric.<sup>3</sup>

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<sup>1</sup> *10 CFR Parts 2, 50, 51, 52, and 100 Limited Work Authorizations for Nuclear Power Plants*, Final Rule, 72 Fed. Reg. 57,416 (Oct. 7, 2007).

<sup>2</sup> 72 Fed. Reg. 57,425.

<sup>3</sup> See 72 Fed. Reg. 57,425-57,430.

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In contrast to the LWA rule, this proposed rule does not address this important threshold question. Rather, the proposed rule seems to assume that the Commission has authority to license construction of *all facilities* covered by 10 C.F.R. Parts 30, 40, and 70. Given this assumption, the proposed rule focuses exclusively on the issue of how construction should be defined. While it is fairly clear that the NRC has statutory authority to license both the construction and operation of *some facilities* covered by the proposed rule,<sup>4</sup> it is equally clear that the NRC does not have authority to license the construction of *all facilities* covered by the proposed rule. For example, the provisions of the Atomic Energy Act (AEA) that are traditionally cited as providing the NRC's general licensing authority give the agency authority to license the manufacture, production, transfer, delivery, distribution, receipt, acquisition, ownership, possession, use, disposal, import, and export of specific classes of material – e.g., source, byproduct and special nuclear materials.<sup>5</sup> On the other hand, specific statutory provisions calling for the licensing of construction activities are more limited, and apply to specific types of facilities – e.g., production and utilization facilities and uranium enrichment facilities.<sup>6</sup>

Consistent with this statutory framework, in a 2003 Memorandum and Order the Commission recognized its limited authority to halt construction of a facility that would be used to down-blend highly enriched uranium.<sup>7</sup> In *Nuclear Fuel Services*, a licensee sought several license amendments in order to participate in a Department of Energy program designed to reduce stockpiles of surplus high enriched uranium (HEU) through reuse as low enriched uranium (LEU) or disposal as radioactive waste.<sup>8</sup> Specifically, the licensee sought three amendments to its existing license to modify its operations in order to produce LEU oxide, receive and store LEU nitrate, down-blend HEU to LEU, and convert LEU nitrate to LEU oxide – all of which were required to complete the project. Importantly, the three license amendment requests involved the construction of three new facilities on the licensee's site.<sup>9</sup> Petitioners in the case requested that the Commission enjoin all of the construction activities associated with the license amendments "because NFS's construction is proceeding *before* the NRC staff has complied with NEPA by completing its environmental review and determining whether an Environmental Impact Statement (EIS) is required for the proposed . . . project."<sup>10</sup>

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<sup>4</sup> See, e.g., Atomic Energy Act of 1954, as amended (AEA), § 193, 42 U.S.C. § 2243 (which references issuance of licenses "for the construction and operation of uranium enrichment facilities").

<sup>5</sup> See AEA §§ 53, 62, 63, 81, 42 U.S.C. §§ 2073, 2092, 2093, 2111.

<sup>6</sup> See AEA §§ 185, 193, 42 U.S.C. §§ 2235, 2243.

<sup>7</sup> *Nuclear Fuel Services, Inc.* (Erwin, Tennessee), CLI-03-03, 57 NRC 239 (2003)(*Nuclear Fuel Services*).

<sup>8</sup> *Id.* at 240.

<sup>9</sup> *Id.* at 241.

<sup>10</sup> *Id.* at 242 (emphasis in original). At the time of the petition, the NRC staff had completed an Environmental Assessment and issued a Finding of No Significant Impact (FONSI) for the first license amendment request (LAR), but had not completed its environmental review of the second and third LARs. However, the decision indicates that the licensee had commenced construction on at least one of the

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Although finding that the petitioner's claims fell outside the scope of the adjudicatory proceeding, the Commission nonetheless reviewed the claims. The Commission began its analysis by addressing its apparent lack of authority to license – and thus enjoin – the construction activities in question. Specifically, the Commission stated:

To begin with, it is questionable whether the Commission has authority to halt NFS's pre-licensing construction activities in the circumstances of this case. The record before us does not reveal any statute or regulation that requires NFS to obtain a construction permit or similar authorization prior to beginning construction. The Atomic Energy Act provisions authorizing NRC construction permits in some settings do not apply here.<sup>11</sup>

The Commission reached these conclusions, despite the fact that §§ 51.101(a) and 70.23(a)(7) "*contemplate* that construction . . . should not begin until the NRC has completed its environmental review."<sup>12</sup> Finding no statutory authority for prohibiting construction of the specific type of facility in question, the Commission necessarily read § 70.23(a)(7) as discouraging rather than prohibiting construction prior to completion of the NRC's NEPA review.<sup>13</sup> While this may have been the only reasonable interpretation of § 70.23, given the specific facts before the Commission in the *Nuclear Fuel Services* case, we note that all of the provisions at issue in this proposed rule use mandatory language to describe the limitation on commencement of construction. For example:

- 10 CFR 30.33 (a)(5) currently states: "Commencement of construction prior to [completion of the NRC's NEPA review] *shall be* grounds for denial of a license to receive and possess byproduct material in such plant or facility. (emphasis added)
- 10 CFR 40.32(e) currently states: "Commencement of construction prior to [completion of the NRC's NEPA review] *is grounds* for denial of a license to possess and use source and byproduct material in the plant or facility." (emphasis added)
- 10 CFR 70.23(a)(7) currently states: "Commencement of construction prior to [completion of the NRC's NEPA review] *is grounds* for denial to possess and use special nuclear material in the plant or facility." (emphasis added)

Notwithstanding the Commission's interpretation of § 70.23 in *Nuclear Fuel Services*, the regulatory provisions quoted above permit the staff to deny a license application or license amendment request based solely on the fact that the applicant commenced construction prior

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three required buildings and planned to commence construction on the additional buildings "within a week or two." *Id.*

<sup>11</sup> *Id.* at 246, *citing* AEA § 185, 42 U.S.C. 2235 (construction permits for production and utilization facilities).

<sup>12</sup> *Id.* (footnotes omitted).

<sup>13</sup> *Id.* at 246 - 247.

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to completion of the NRC's NEPA review. Thus, these provisions are tantamount to a prohibition on construction. The Supplementary Information published with the proposed rule describes the provisions quoted above in precisely this way:

Currently, 10 CFR 40.32(e) *prohibits* an applicant for a license for a uranium enrichment facility or for a license to possess and use source and byproduct materials for uranium milling, production of uranium hexafluoride, or for any other activity requiring NRC authorization from commencing construction of the plant or facility in which the activity will be conducted before the NRC's decision to issue the proposed license. . . . Similar *prohibitions* on construction exist with respect to 10 CFR parts 30, 36, and 70.<sup>14</sup>

The NRC's description of §§ 40.32, 30.33, and 70.23 in the proposed rule is consistent with the description provided in the 1972 final rule promulgating those provisions.<sup>15</sup> Specifically, in describing a provision allowing continuation of construction activities that had commenced prior to issuance of the final rule, the NRC explained that construction activities were "in effect, precluded by these amendments until the environmental review is complete."<sup>16</sup> Absent any consideration of whether the AEA provides the NRC with authority to license construction in the first instance, the categorical prohibition of construction contained in §§ 30.33, 40.32, and 70.23 could result in ultra vires action by the agency, and is inconsistent with the *Nuclear Fuel Services* decision as well as the philosophy underlying the LWA rule.

It is also clear that NEPA does not authorize the Commission to prohibit construction in situations where such authority is not provided by the AEA. This issue was also addressed in the *Nuclear Fuel Services* decision. After stressing that the petitioners had "pointed to no NRC rule as a basis for a Commission injunction against NFS," the Commission explained that instead the petitioners had relied upon NEPA to justify the proposed injunction.<sup>17</sup> Specifically, the petitioners "suggest[ed] that the Commission . . . treat NFS's construction activities as a federal action and order NFS to suspend them."<sup>18</sup> The Commission rejected this argument, reasoning that because the licensee did not require any NRC permit to begin construction activities, the Commission's authority to halt those activities was questionable. The Commission also explained that the construction activities at issue would not pre-ordain or restrict the agency's decision making because the staff retained full discretion to deny any or all of the license amendments in question. As the Commission pointed out, in such a situation the applicant

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<sup>14</sup> 75 Fed. Reg. 43,865-43,866 (emphasis added).

<sup>15</sup> *Prohibition of Site Preparation and Related Activities*, 37 Fed. Reg. 5,746 (March 21, 1972).

<sup>16</sup> 37 Fed. Reg. 5,746.

<sup>17</sup> 57 N.R.C. at 248.

<sup>18</sup> *Id.* (internal quotations omitted).

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"commits construction resources at its own financial risk."<sup>19</sup> This is analogous to the reasoning that the Commission relied upon in the LWA rule.<sup>20</sup>

Further, in reaching its conclusions on the legal effect of NEPA, the Commission relied upon *Natural Resources Defense Council v. EPA*.<sup>21</sup> In *NRDC*, the Environmental Protection Agency (EPA) sought to prohibit on-site construction of new sources of pollution until after issuance of National Pollutant Discharge Elimination System (NPDES) permits, which would incorporate appropriate NEPA-related requirements.<sup>22</sup> This prohibition on construction was included in the EPA's regulations implementing the Clean Water Act. According to the regulations in question, violation of the ban on construction was grounds for denial of the NPDES permit. As the court explained, the EPA's construction ban was "designed to preserve the status quo for as long as necessary to complete the NEPA review."<sup>23</sup> The court struck down the ban, reasoning that the Clean Water Act did not provide the EPA with authority to permit or otherwise restrict the construction of new sources of pollution.<sup>24</sup> Further, the court dismissed EPA's arguments that NEPA provided the agency with such authority, stating that "NEPA, as a procedural device, does not work a broadening of the agency's substantive powers. Whatever action the agency chooses to take must, of course, be within its province in the first instance."<sup>25</sup> In light of *NRDC*, in *Nuclear Fuel Services* the Commission concluded that "[a]nalogous circumstances are present here, where the AEA and NRC rules require a license to conduct the . . . project, but neither statute nor rule prevents NFS from beginning construction of [the] . . . project buildings." Ultimately, the Commission concluded, "[i]n the end, NEPA does not mandate action which goes beyond the agency's organic jurisdiction."<sup>26</sup> This interpretation of NEPA is consistent with the reasoning used by the Commission to explain its approach to defining "construction" in the 2007 LWA rule.<sup>27</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> 72 Fed. Reg. 57,428 (explaining that the LWA process is consistent with the Commission's previous position that NEPA does not, as a general matter, prohibit an agency from undertaking part of a project prior to completing an environmental analysis covering the entire project).

<sup>21</sup> 822 F.2d 104 (D.C. Cir. 1987)(*NRDC*).

<sup>22</sup> In the alternative, EPA's regulatory scheme also allowed applicants to begin construction 30 days after issuance of a FONSI. *Id.* at 127.

<sup>23</sup> *Id.* at 127.

<sup>24</sup> *Id.* at 128.

<sup>25</sup> *Id.* at 129.

<sup>26</sup> 57 N.R.C. at 250, quoting *Gage v. Atomic Energy Commission*, 479 F.2d 1214, 1120 n.19 (DC Cir 1973).

<sup>27</sup> See 72 Fed. Reg. 57,427 (explaining that NEPA is a procedural statute and does not expand the jurisdiction delegated to an agency by its organic statute).

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Thus, as the *Nuclear Fuel Services* decision demonstrates, the NRC does not necessarily have statutory authority to license the construction of *all of the facilities* covered by the proposed rule. Further, unless limited to situations where the NRC has such authority, the categorical prohibition on construction prior to completion of the agency's NEPA review contained in §§ 30.33, 40.32, and 70.23 is inconsistent with the Commission's decision in *Nuclear Fuel Services*, the DC Circuit's decision in *NRDC v. EPA*, and the philosophy underlying the LWA rule.

Based on the discussion provide above, NEI recommends that the NRC revise the proposed rule consistent with the changes provided in Section V below. In addition, NEI recommends that the Supplementary Information published with the final rule explain how the NRC will go about determining the extent of its authority to license construction of specific types of fuel cycle and materials facilities so that applicants will be able to better plan construction projects.<sup>28</sup>

**III. The Concept of "Commencement of Construction" is No Longer Necessary and Should be Removed from the Regulations.**

Once the prohibition on construction is properly limited consistent with the NRC's statutory authority to license construction, the definition of construction can be addressed. As explained in the LWA rule, the concept of "commencement of construction" was added to 10 CFR § 50.10 in 1972 in order to give effect to the now-outdated idea that NEPA expands the NRC's permitting/licensing authority.<sup>29</sup> Specifically, in response to a public comment questioning the basis for the NRC's change in position regarding the definition of construction, the NRC stated:

As discussed in the "Discussion" section of this final rule (as well as the supplemental proposed rule), the 1972 amendment to the definition of construction in 10 CFR 50.10 was made early in the Federal government's implementation of then-new NEPA. Since that time, the Federal case law on NEPA has evolved, with several U.S. Supreme Court decisions on the requirements of NEPA. In addition, in preparing for the expected next generation of nuclear power plant construction applications, the nuclear power industry has reviewed the overall construction process based upon lessons learned from the construction and licensing process used for currently operating reactors. The industry submitted what is essentially a petition for rulemaking seeking changes to the LWA process, reflecting those lessons learned and their understanding of the current state of NEPA law. The NRC has reviewed the applicable law, and for the reasons stated elsewhere in this SOC, agrees with the petitioner that the current definition of construction and the current LWA requirements in § 50.10 are not compelled by NEPA or the Atomic Energy Act (AEA) of 1954, as amended. While the agency's regulations on construction and LWAs were a reasonable implementation of NEPA as understood in

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<sup>28</sup> NEI believes that the most workable approach will be for the NRC to identify the limited types of materials and fuel cycle facilities over which it has statutory authority to license construction and, thus, to which construction bans may be applied.

<sup>29</sup> See 72 Fed. Reg. 57,427 ("Section 50.10(c) was originally added to Part 50 due to the interpretation that NEPA, not a change in the powers given to the agency in the AEA, required the NRC to expand its permitting/licensing authority. However, subsequent judicial decisions have made it clear that NEPA is a procedural statute and does not expand the jurisdiction delegated to an agency by its organic statute.").



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1972, the NRC believes that, with more than 30 years experience in implementing NEPA and the evolving jurisprudence, the time is appropriate for reconsideration and revamping of these NRC requirements.<sup>30</sup>

The NRC's reconsideration of its rules governing construction resulted in revisions to § 50.10, which *eliminated* the concept of "commencement of construction" and redefined construction to include only those activities having a reasonable nexus to radiological health and safety and/or common defense and security.<sup>31</sup> The concept of commencement of construction is no longer necessary in Part 50 because the term "construction" is now properly aligned with the Commission's authority to regulate in the interest of protecting the public health and safety and the common defense and security.

The term "commencement of construction" was added to Parts 30, 40, and 70 in the same 1972 final rulemaking that added the term to § 50.10(c). In that final rule, the NRC explained that the "[a]mendments to Parts 30, 40, and 70 of the Commission's regulations in Title 10 of the Code of Federal Regulations provide for Commission environmental review prior to commencement of construction of plants and facilities in which activities subject to materials licensing requirements . . . will be conducted."<sup>32</sup> Thus, it seems that the modifications to Parts 30, 40, and 70 were based on the same outdated understanding of NEPA, from which the NRC appropriately departed in the LWA rule.

Given the updated view of NEPA articulated in the LWA rule, NEI believes that "commencement of construction" – as a concept distinct from "construction" – is no longer necessary and should be removed from the regulations. Specifically, the NRC's proposed definition of the term "commencement of construction" reads:

Commencement of construction means taking any action defined as "construction" or any site-preparation activity at the site of a facility subject to the regulations in this part that has a reasonable nexus to:

- (1) Radiological health and safety; or
- (2) Common defense and security.<sup>33</sup>

To the extent that the proposed definition of commencement of construction simply duplicates the definition of construction, it is unnecessary. More importantly, the proposed definition creates ambiguity with respect to site preparation activities. Site preparation activities are specifically excluded from the proposed definition of "construction," which reads:

Construction means the installation of foundations, in-place assembly, erection, fabrication, or testing for any structure, system, or component of a facility or activity

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<sup>30</sup> 72 Fed. Reg. 57,420.

<sup>31</sup> 72 Fed. Reg. 57,426.

<sup>32</sup> 37 Fed. Reg. 5,746.

<sup>33</sup> 75 Fed. Reg. 43,872 – 43,875.

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subject to the regulations in this part that are related to radiological safety or security. The term "construction" does not include:

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(3) Preparation of the site for construction of the facility, including clearing of the site, grading, installation of drainage, erosion and other environmental mitigation measures, and construction of temporary roads and borrow areas;

(4) Erection of fences and other access control measures that are not related to the safe use of, or security of, radiological materials subject to this part;

(5) Excavation;

(6) Erection of support buildings (e.g., construction equipment storage sheds, warehouse and shop facilities, utilities, concrete mixing plants, docking and unloading facilities, and office buildings) for use in connection with construction of the facility;

(7) Building of service facilities (e.g., paved roads, parking lots, railroad spurs, exterior utility and lighting systems, potable water systems, sanitary sewerage treatment facilities, and transmission lines);

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(9) Taking any other action that has no reasonable nexus to:

(i) Radiological health and safety; or

(ii) Common defense and security<sup>34</sup>

Exclusion of site preparation activities from the definition of construction is based upon the Commission's determination in the LWA rule that these activities "do not affect, as a general matter, radiological health and safety or common defense and security."<sup>35</sup> But, contrary to this conclusion, the proposed definition of commencement of construction implies that there are some "site-preparation" activities that, while explicitly excluded from the definition of construction, may still be considered "commencement of construction." This is the type of internal inconsistency that the LWA rule was designed to eliminate. Eliminating the concept of "commencement of construction" from the rule would clarify that the activities excluded from the definition of construction will not require an NRC license or permit and may be undertaken by the applicant at its own financial risk. Further, retaining the concept of "commencement of construction" is unnecessary given that the definition of construction is broadly written to encompass "in-place assembly, erection, fabrication, or testing for any structure, system, or component of a facility or activity subject to the regulations in this part that are related to

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<sup>34</sup> 75 Fed. Reg. 43,872-43,875.

<sup>35</sup> 75 Fed. Reg. 43,868.

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radiological safety or security." This definition would seem to capture any activities having a reasonable nexus to protecting public health and safety and the common defense and security.

Thus, NEI believes that the concept of "commencement of construction" should be removed from the proposed rule. The revisions provided in Section V below reflect this recommendation.

**IV. An LWA Process is Appropriate for the Facilities Covered by the Proposed Rule.**

NEI continues to believe that fuel cycle and materials applicants should be given a similar degree of flexibility as applicants for licenses to construct and operate nuclear reactors. In situations where the NRC has authority to license construction of fuel cycle and other materials facilities, providing an LWA-like process allowing limited construction activities prior to issuance of the underlying license would provide such flexibility and avoid the need for exemption requests seeking permission to conduct such activities.

In the proposed rule, NRC questioned the necessity and appropriateness of such a provision as applied to fuel cycle and materials licensees.<sup>36</sup> With respect to the necessity of such a provision, the NRC noted that "[a] review of recent requests for exemption from the construction prohibition shows that most requests would have been rendered unnecessary by a materials construction definition that conforms to Part 51."<sup>37</sup> But a similar argument could have been made with respect to reactor licensing as, without the LWA process, a good portion (if not the majority) of the exemptions requested pursuant to § 50.12 would likely have been requests to perform non-safety related site preparation activities. This makes sense because non-safety-related site preparation activities (e.g., site clearing; grading; installation of drainage, erosion and other environmental mitigation measures; construction of temporary roads and borrow areas) typically occur prior to safety-related construction activities and, thus, are likely to be more important from a scheduling standpoint earlier in a construction project. Nonetheless, contrary to the approach taken in this proposed rule, the NRC provided an LWA process for safety-related construction activities when it originally modified Part 50 to include the LWA option in 1974<sup>38</sup> and retained that process when it substantially revised the LWA rule and redefined construction in 2007.<sup>39</sup> Consistent with the approach taken in the context of reactor licensing, NEI believes that the better regulatory practice is to affirmatively provide flexibility by adopting an LWA-like process for fuel cycle and materials licensees, rather than continuing to rely on the exemption process.

The NRC also questioned the appropriateness of including an LWA provision for fuel cycle and materials licensees. Specifically, the proposed rule states:

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<sup>36</sup> 75 Fed. Reg. 43,867.

<sup>37</sup> *Id.*

<sup>38</sup> 72 Fed. Reg. 57,426.

<sup>39</sup> 72 Fed. Reg. 57,416.

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[G]iven the NRC's explicit statement in 1980 of the breadth of issues that should be resolved prior to constructing parts 30, 40, and 70 facilities, there is some question as to whether an LWA process is appropriate in the context of materials licensing, which would permit safety or security-related construction to occur prior to a conclusion that a license should be issued. In the UMTRCA-related rulemaking, the NRC found that construction activities at plants and facilities in which source or byproduct materials are possessed and used for the production of uranium hexafluoride and commercial waste disposal by land burial should not precede the environmental review as they "are likely to result in [irrevocable and/or irretrievable] environmental impacts, the propriety of which cannot be ascertained until [the Part 51] environmental appraisals are completed and documented." (45 FR 65521, 65529; October 3, 1980). Accordingly, the NRC is not including in the proposed rule language an LWA process for 10 CFR parts 30, 36, 40, or 70 licensees and applicants, and to the extent that an applicant for a 10 CFR parts 30, 36, 40, or 70 license wishes to perform site activities that are related to radiological health and safety or preservation of the common defense and security, the applicant would be prohibited from doing so under the proposed rule until the NRC has completed its environmental review and concluded that a license should be issued. Nevertheless, the NRC invites comments on the utility of an LWA process for 10 CFR parts 30, 36, 40, and 70, including whether such a process would be appropriate for all, or merely some, materials licenses.<sup>40</sup>

NEI does not believe that the concerns expressed in the above-quoted passage support NRC's decision not to include an LWA provision in the proposed rule. Specifically, the NRC's primary concern seems to be that allowing construction of certain facilities prior to completion of the NRC's environmental review would be undesirable because such construction activities are likely to result in irrevocable and/or irretrievable environmental impacts, before those impacts can be evaluated by the NRC. But this concern seems to ignore the fact that, under the framework established in Part 50, an LWA permits only limited construction activities and the environmental impacts associated with those proposed activities must be evaluated in an Environmental Impact Statement *before the LWA can be issued*. For example, 10 C.F.R. § 50.10(d)(1) provides that an LWA may be requested permitting "driving of piles, subsurface preparation, placement of backfill, concrete, or permanent retaining walls within an excavation, installation of the foundation, including placement of concrete." Thus, with respect to nuclear reactors, the construction activities allowed pursuant to an LWA are limited to those associated with foundation building. In addition, § 50.10(d)(3) requires that an LWA application include a Safety Analysis Report (SAR), an Environmental Report (ER), and a plan for redress of activities to be performed pursuant to the LWA. The authorization may be issued *only after* the NRC staff issues the final EIS for the LWA in accordance with Part 51, the presiding officer makes the NEPA findings required in §§ 51.105(c) and 51.107(d), and the presiding officer finds that there are no unresolved safety issues relating to the activities to be conducted under the LWA.<sup>41</sup> Thus, LWA provisions modeled after those contained in 10 C.F.R. § 50.10 would address the

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<sup>40</sup> 75 Fed. Reg. 42,867.

<sup>41</sup> 10 C.F.R. § 50.10(d).

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concerns expressed in the proposed rule because the LWA would not be granted until after a final EIS is issued and the necessary safety and environmental findings have been made.

As explained above in Section II, NEI does not believe that the NRC has statutory authority to license the construction of *all facilities* that would be subject to the proposed rule. Because no construction permit, or other NRC license, would be necessary prior to constructing facilities in situations where the NRC does not have statutory authority to license construction, NEI does not believe that LWA provisions (which can be analogized to a partial construction permit) would be necessary in these situations. On the other hand, for the reasons explained above, NEI recommends that an LWA-like process should be made available to those applicants seeking to build fuel cycle and materials facilities for which a construction permit or other form of pre-approval is required.

**V. Suggested Revisions to the Proposed Rule Language.**

Consistent with the discussion provided above, NEI suggests the following revisions to the proposed rule language. Footnotes are intended to explain the proposed changes and are not intended to be included in the final rule language.

**§ 30.4 Definitions.**

~~**Commencement of construction means taking any action defined as “construction” or site preparation activity at the site of a facility subject to the regulations in this part that has a reasonable nexus to:**~~

~~**(1) Radiological health and safety; or**~~

~~**(2) Common defense and security.**~~<sup>42</sup>

*Construction* means the installation of foundations, or in-place assembly, erection, fabrication, or testing for any structure, system, or component of a facility or activity subject to the regulations in this part that are related **have a reasonable nexus** to radiological **health and safety** or **common defense and security** **for which regulatory oversight is necessary and most effective in ensuring reasonable assurance of adequate protection to public health and safety or common defense and security.** The term “construction” does not include:<sup>43</sup>

(1) Changes for temporary use of the land for public recreational purposes;

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<sup>42</sup> See explanation, *supra*, at Section III.

<sup>43</sup> This modification is based on language in the Supplementary Information published with the LWA rule and is intended to make the definition of construction in the proposed rule more consistent with the definition provided in the LWA rule. See 72 Fed. Reg. 57,426, Col. III. It also makes the affirmative definition of construction internally consistent with the exclusion provided in the paragraph (9) of the proposed definition of construction.

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(2) Site exploration, including necessary borings to determine foundation conditions or other preconstruction monitoring to establish background information related to the suitability of the site, the environmental impacts of construction or operation, or the protection of environmental values;

(3) Preparation of the site for construction of the facility, including clearing of the site, grading, installation of drainage, erosion and other environmental mitigation measures, and construction of temporary roads and borrow areas;

(4) Erection of fences and other access control measures that are not related to the safe use of, or security of, radiological materials subject to this part;

(5) Excavation;

(6) Erection of support buildings (e.g., construction equipment storage sheds, warehouse and shop facilities, utilities, concrete mixing plants, docking and unloading facilities, and office buildings) for use in connection with the construction of the facility;

(7) Building of service facilities (e.g., paved roads, parking lots, railroad spurs, exterior utility and lighting systems, potable water systems, sanitary sewerage treatment facilities, and transmission lines);

(8) Procurement or fabrication of components or portions of the proposed facility occurring at other than the final, in-place location at the facility; or

(9) Taking any other action that has no reasonable nexus to:

(i) Radiological health and safety, or

(ii) Common defense and security.

**§ 30.33 General requirements for issuance of specific licenses.**

(a)

\* \* \*

(5)(i) In the case of an application for a license to receive and possess byproduct material for the conduct of any activity which the NRC determines will significantly affect the quality of the environment, the Director, Office of Federal and State Materials and Environmental Management Program or his designee, ~~before commencement of construction of the plant or facility in which the activity will be conducted~~, on the basis of information filed and evaluations made pursuant to subpart A of part 51 of this chapter, has concluded, after weighing the environmental, economic, technical, and other benefits against environmental costs and considering available alternatives, that the action called for is the issuance of the proposed license, with any appropriate conditions to protect environmental values.

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**(ii) In situations where the NRC has authority to license construction of the plant or facility, as well as receipt and possession of byproduct material, this conclusion shall be reached before construction begins. Beginning construction of such facilities** ~~Commencement of construction~~ prior to ~~such~~ **issuance of the conclusion described above in paragraph (5)(i)** shall be grounds for denial of a license to receive and possess byproduct material in such plant or facility.<sup>44</sup>

**§ 36.2 Definitions.**

\* \* \* \* \*

~~**Commencement of construction means taking any action defined as "construction" or any site preparation activity at the site of a facility subject to the regulations in this part that has a reasonable nexus to:**~~

~~**(1) Radiological health and safety; or**~~

~~**(2) Common defense and security.**~~<sup>45</sup>

*Construction* means the installation of foundations, or in-place assembly, erection, fabrication, or testing for any structure, system, or component of a facility or activity subject to the regulations in this part that are related **have a reasonable nexus to radiological health and safety or common defense and security for which regulatory oversight is necessary and most effective in ensuring reasonable assurance of adequate protection to public health and safety or common defense and security.** The term "construction" does not include:<sup>46</sup>

(1) Changes for temporary use of the land for public recreational purposes;

(2) Site exploration, including necessary borings to determine foundation conditions or other preconstruction monitoring to establish background information related to the suitability of the site, the environmental impacts of construction or operation, or the protection of environmental values;

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<sup>44</sup> See explanation, *supra*, at Section II.

<sup>45</sup> See explanation, *supra*, Section III.

<sup>46</sup> This modification is based on language in the Supplementary Information published with the LWA rule and is intended to make the definition of construction in the proposed rule more consistent with the definition provided in the LWA rule. See 72 Fed. Reg. 57,426, Col. III. It also makes the affirmative definition of construction internally consistent with the exclusion provided in the paragraph (9) of the proposed definition of construction.

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- (3) Preparation of the site for construction of the facility, including clearing of the site, grading, installation of drainage, erosion and other environmental mitigation measures, and construction of temporary roads and borrow areas;
- (4) Erection of fences and other access control measures that are not related to the safe use of, or security of, radiological materials subject to this part;
- (5) Excavation;
- (6) Erection of support buildings (e.g., construction equipment storage sheds, warehouse and shop facilities, utilities, concrete mixing plants, docking and unloading facilities, and office buildings) for use in connection with the construction of the facility;
- (7) Building of service facilities (e.g., paved roads, parking lots, railroad spurs, exterior utility and lighting systems, potable water systems, sanitary sewerage treatment facilities, and transmission lines);
- (8) Procurement or fabrication of components or portions of the proposed facility occurring at other than the final, in-place location at the facility; or
- (9) Taking any other action that has no reasonable nexus to:
  - (i) Radiological health and safety, or
  - (ii) Common defense and security.

\* \* \* \* \*

**§ 36.15 Commencement Start of construction.**<sup>47</sup>

~~Commencement of~~ Construction of a new irradiator may not ~~occur~~ **begin** prior to the submission to NRC of both an application for a license for the irradiator and the fee required by § 170.31 of this chapter. Any activities undertaken prior to the issuance of a license are entirely at the risk of the applicant and have no bearing on the issuance of a license with respect to the requirements of the Atomic Energy Act of 1954 (Act), as amended, and rules, regulations, and orders issued under the Act.<sup>48</sup>

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<sup>47</sup> This modification would maintain the current rule language and is appropriate given NEI's recommendation that the concept of "commencement of construction" be removed from the regulatory framework.

<sup>48</sup> Notably, this provision does not prohibit construction prior to issuance of a license or completion of the NRC's NEPA review. Rather, it simply requires submittal of the application and payment of fees before construction may begin. According to the final rule promulgating this provision, it is intended to "allow regulatory agencies to inspect the construction of the facility as it is built." 58 Fed. Reg. 7,717 (Feb. 9, 1993).



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**§ 40.4 Definitions.**

~~**Commencement of construction means taking any action defined as “construction” or site-preparation activity at the site of a facility subject to the regulations in this part that has a reasonable nexus to:**~~

~~**(1) Radiological health and safety; or**~~

~~**(2) Common defense and security.**~~<sup>49</sup>

*Construction* means the installation of foundations, or in-place assembly, erection, fabrication, or testing for any structure, system, or component of a facility or activity subject to the regulations in this part that are related have a reasonable nexus to radiological health and safety or common defense and security for which regulatory oversight is necessary and most effective in ensuring reasonable assurance of adequate protection to public health and safety or common defense and security. The term “construction” does not include:<sup>50</sup>

- (1) Changes for temporary use of the land for public recreational purposes;
- (2) Site exploration, including necessary borings to determine foundation conditions or other preconstruction monitoring to establish background information related to the suitability of the site, the environmental impacts of construction or operation, or the protection of environmental values;
- (3) Preparation of the site for construction of the facility, including clearing of the site, grading, installation of drainage, erosion and other environmental mitigation measures, and construction of temporary roads and borrow areas;
- (4) Erection of fences and other access control measures that are not related to the safe use of, or security of, radiological materials subject to this part;
- (5) Excavation;
- (6) Erection of support buildings (e.g., construction equipment storage sheds, warehouse and shop facilities, utilities, concrete mixing plants, docking and unloading facilities, and office buildings) for use in connection with the construction of the facility;

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<sup>49</sup> See explanation, *supra*, at Section III.

<sup>50</sup> This modification is based on language in the Supplementary Information published with the LWA rule and is intended to make the definition of construction in the proposed rule more consistent with the definition provided in the LWA rule. See 72 Fed. Reg. 57,426, Col. III. It also makes the affirmative definition of construction internally consistent with the exclusion provided in the paragraph (9) of the proposed definition.

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- (7) Building of service facilities (e.g., paved roads, parking lots, railroad spurs, exterior utility and lighting systems, potable water systems, sanitary sewerage treatment facilities, and transmission lines);
- (8) Procurement or fabrication of components or portions of the proposed facility occurring at other than the final, in-place location at the facility; or
- (9) Taking any other action that has no reasonable nexus to:
- (i) Radiological health and safety, or
  - (ii) Common defense and security.

**§ 40.32 General requirements for issuance of specific licenses.**

\* \* \* \* \*

(e)(1) In the case of an application for a license for a uranium enrichment facility, or for a license to possess and use source and byproduct material for uranium milling, production of

uranium hexafluoride, or for the conduct of any other activity which the NRC determines will significantly affect the quality of the environment, the Director, Office of Federal and State Materials and Environmental Management Programs or his designee, ~~before commencement of construction,~~ on the basis of information filed and evaluations made pursuant to subpart A of part 51 of this chapter, has concluded, after weighing the environmental, economic, technical and other benefits against environmental costs and considering available alternatives, that the action called for is the issuance of the proposed license, with any appropriate conditions to protect environmental values. ~~Commencement of construction prior to this conclusion is grounds for denial of a license to possess and use source and byproduct material in the plant or facility.~~

**(2) In situations where the NRC has authority to license construction of the facility, as well as possession and use of source and byproduct material, this conclusion shall be reached before construction begins. Beginning construction of such facilities** ~~Commencement of construction~~ prior to **such issuance of the** conclusion **described above in paragraph (e)(1)** shall be grounds for denial of a license to receive and possess byproduct material in such plant or facility.<sup>51</sup>

**§ 51.4 Definitions.**

\* \* \* \* \*

*Construction* means:

- (1) For production and utilization facilities, the activities in paragraph (i) of this definition, and does not mean the activities in paragraph (ii) of this definition.

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<sup>51</sup> See explanation, *supra*, at Section II.

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(i) Activities constituting construction are the driving of piles, subsurface preparation, placement of backfill, concrete, or permanent retaining walls within an excavation, installation of foundations, or in-place assembly, erection, fabrication, or testing, which are for:

(A) Safety-related structures, systems, or components (SSCs) of a facility, as defined in 10 CFR 50.2;

(B) SSCs relied upon to mitigate accidents or transients or used in plant emergency operating procedures;

(C) SSCs whose failure could prevent safety-related SSCs from fulfilling their safety-related function;

(D) SSCs whose failure could cause a reactor scram or actuation of a safety-related system;

(E) SSCs necessary to comply with 10 CFR part 73;

(F) SSCs necessary to comply with 10 CFR 50.48 and criterion 3 of 10 CFR part 50, appendix A; and

(G) Onsite emergency facilities (i.e., technical support and operations support centers), necessary to comply with 10 CFR 50.47 and 10 CFR part 50, appendix E.

(ii) Construction does not include:

(A) Changes for temporary use of the land for public recreational purposes;

(B) Site exploration, including necessary borings to determine foundation conditions or other preconstruction monitoring to establish background information related to the suitability of the site, the environmental impacts of construction or operation, or the protection of environmental values;

(C) Preparation of a site for construction of a facility, including clearing of the site, grading, installation of drainage, erosion and other environmental mitigation measures, and construction of temporary roads and borrow areas;

(D) Erection of fences and other access control measures that are not safety or security related, and do not pertain to radiological controls;

(E) Excavation;

(F) Erection of support buildings (e.g., construction equipment storage sheds, warehouse and shop facilities, utilities, concrete mixing plants, docking and unloading facilities, and office buildings) for use in connection with the construction of the facility;

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(G) Building of service facilities (*e.g.*, paved roads, parking lots, railroad spurs, exterior utility and lighting systems, potable water systems, sanitary sewerage treatment facilities, and transmission lines);

(H) Procurement or fabrication of components or portions of the proposed facility occurring at other than the final, in-place location at the facility;

(I) Manufacture of a nuclear power reactor under a manufacturing license under subpart F of part 52 of this chapter to be installed at the proposed site and to be part of the proposed facility; or

(J) With respect to production or utilization facilities, other than testing facilities and nuclear power plants, required to be licensed under Section 104.a or Section 104.c of the Act, the erection of buildings which will be used for activities other than operation of a facility and which may also be used to house a facility (*e.g.*, the construction of a college laboratory building with space for installation of a training reactor).

(2) For materials licenses, ~~taking any site preparation activity at the site of a facility subject to the regulations in 10 CFR parts 30, 36, 40, and 70, that has a reasonable nexus to radiological health and safety or the common defense and security;~~ *construction* means the installation of foundations, or in-place assembly, erection, fabrication, or testing for any structure, system, or component of a facility or activity subject to the

regulations in this part that are related have a reasonable nexus to radiological health and safety or common defense and security for which regulatory oversight is necessary and most effective in ensuring reasonable assurance of adequate protection to public health and safety or common defense and security; provided, however, that construction does not mean:<sup>52</sup>

(i) Those actions or activities listed in paragraphs (1)(ii)(A)—(H) of this definition; or

(ii) Taking any other action that has no reasonable nexus to radiological health and safety or the common defense and security.

\* \* \* \* \*

**§ 70.4 Definitions.**

~~**Commencement of construction means taking any action defined as "construction" or site preparation activity at the site of a facility subject to the regulations in this part that has a reasonable nexus to:**~~

~~**(1) Radiological health and safety; or**~~

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<sup>52</sup> This modification is intended to make the definition of construction provided in 10 C.F.R. Part 51 consistent with the definitions being added to Parts 30, 36, 40, and 70 in the proposed rule.

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**~~(2) Common defense and security.~~**<sup>53</sup>

*Construction* means the installation of foundations, or in-place assembly, erection, fabrication, or testing for any structure, system, or component of a facility or activity subject to the regulations in this part that are related **have a reasonable nexus to radiological health and safety or common defense and security for which regulatory oversight is necessary and most effective in ensuring reasonable assurance of adequate protection to public health and safety or common defense and security.** The term "construction" does not include:<sup>54</sup>

- (1) Changes for temporary use of the land for public recreational purposes;
- (2) Site exploration, including necessary borings to determine foundation conditions or other preconstruction monitoring to establish background information related to the suitability of the site, the environmental impacts of construction or operation, or the protection of environmental values;
- (3) Preparation of the site for construction of the facility, including clearing of the site, grading, installation of drainage, erosion and other environmental mitigation measures, and construction of temporary roads and borrow areas;
- (4) Erection of fences and other access control measures that are not related to the safe use of, or security of, radiological materials subject to this part;
- (5) Excavation;
- (6) Erection of support buildings (e.g., construction equipment storage sheds, warehouse and shop facilities, utilities, concrete mixing plants, docking and unloading facilities, and office buildings) for use in connection with the construction of the facility;
- (7) Building of service facilities (e.g., paved roads, parking lots, railroad spurs, exterior utility and lighting systems, potable water systems, sanitary sewerage treatment facilities, and transmission lines);
- (8) Procurement or fabrication of components or portions of the proposed facility occurring at other than the final, in-place location at the facility; or
- (9) Taking any other action that has no reasonable nexus to:

<sup>53</sup> See explanation, *supra*, at Section III.

<sup>54</sup> This modification is based on language in the Supplementary Information published with the LWA rule and is intended to make the definition of construction in the proposed rule more consistent with the definition provided in the LWA rule. See 72 Fed. Reg. 57,426, Col. III. It also makes the affirmative definition of construction internally consistent with the exclusion provided in the paragraph (9) of the proposed definition of construction.

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- (i) Radiological health and safety, or
- (ii) Common defense and security.

**§ 70.23 Requirements for the approval of applications.**

(a) An application for a license will be approved if the Commission determines that:

\* \* \* \* \*

(7)(i) Where the proposed activity is processing and fuel fabrication, scrap recovery, conversion of uranium hexafluoride, uranium enrichment facility construction and operation, or any other activity which the Commission determines will significantly affect the quality of the environment, the Director of Nuclear Material Safety and Safeguards or his designee, **before commencement of construction of the plant or facility in which the activity will be conducted**, on the basis of information filed and evaluations made pursuant to subpart A of part 51 of this chapter, has concluded, after weighing the environmental, economic, technical, and other benefits against environmental costs and considering available alternatives, that the action called for is the issuance of the proposed license, with any appropriate conditions to protect environmental values. ~~Commencement of construction prior to this conclusion is grounds for denial to possess and use special nuclear material in the plant or facility.~~

**(ii) In situations where the NRC has authority to license construction of the facility, as well as possession and use of special nuclear material, this conclusion shall be reached before construction begins. Beginning construction of such facilities** ~~Commencement of construction~~ prior to **such issuance of the** conclusion **described above in paragraph (7)(i)** shall be grounds for denial of a license to receive and possess byproduct material in such plant or facility.<sup>55</sup>

**§ 150.31 Requirements for Agreement State regulation of byproduct material.**

\* \* \* \* \*

(b) \* \* \*

(3) \* \* \*

(iv) **In situations where the NRC has authority to license construction of the facility in question**, prohibit ~~commencement of~~ construction with respect to such material prior to

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<sup>55</sup> See explanation, *supra*, at Section II.

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complying with the provisions of paragraph (b)(3)(i) through (iii) of this section. As used in this paragraph:<sup>56</sup>

~~(A) The term *commencement of construction* means taking any action defined as "construction" or any site preparation activity at the site of a facility subject to the regulations in this part that has a reasonable nexus to radiological health and safety.~~<sup>57</sup>

**(B) (A)** The term *construction* means the installation of foundations, or in-place assembly, erection, fabrication, or testing for any structure, system, or component of a facility or activity subject to the regulations in this part that are related have a reasonable nexus to radiological health and safety or common defense and security for which regulatory oversight is necessary and most effective in ensuring reasonable assurance of adequate protection to public health and safety or common defense and security. The term "construction" does not include:<sup>58</sup>

- (1) Changes for temporary use of the land for public recreational purposes;
- (2) Site exploration, including necessary borings to determine foundation conditions or other preconstruction monitoring to establish background information related to the suitability of the site, the environmental impacts of construction or operation, or the protection of environmental values;
- (3) Preparation of the site for construction of the facility, including clearing of the site, grading, installation of drainage, erosion and other environmental mitigation measures, and construction of temporary roads and borrow areas;
- (4) Erection of fences and other access control measures that are not related to the safe use of, or security of, radiological materials subject to this part;
- (5) Excavation;

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<sup>56</sup> In order to relinquish authority to prohibit construction activities pursuant to § 274 of the AEA, the NRC must have such authority in the first instance. That is, the agency cannot relinquish authority to an Agreement State that it does not have. *See* explanation, *supra*, at Section II.

<sup>57</sup> *See* explanation, *supra*, at Section III.

<sup>58</sup> This modification is based on language in the Supplementary Information published with the LWA rule and is intended to make the definition of construction in the proposed rule more consistent with the definition provided in the LWA rule. *See* 72 Fed. Reg. 57,426, Col. III. It also makes the affirmative definition of construction internally consistent with the exclusion provided in the paragraph (9) of the proposed definition of construction.

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(6) Erection of support buildings (e.g., construction equipment storage sheds, warehouse and shop facilities, utilities, concrete mixing plants, docking and unloading facilities, and office buildings) for use in connection with the construction of the facility;

(7) Building of service facilities (e.g., paved roads, parking lots, railroad spurs, exterior utility and lighting systems, potable water systems, sanitary sewerage treatment facilities, and transmission lines);

(8) Procurement or fabrication of components or portions of the proposed facility occurring at other than the final, in-place location at the facility; or

(9) Taking any other action that has no reasonable nexus to:

(i) Radiological health and safety, or

(ii) Common defense and security.



## Rulemaking Comments

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**From:** Gallagher, Carol  
**Sent:** Tuesday, November 30, 2010 4:23 PM  
**To:** Rulemaking Comments  
**Subject:** Comment on Proposed Rule - Licenses, Certifications and Approvals for Material Licenses  
**Attachments:** NRC-2010-0075-DRAFT-0018.pdf

Van,

Attached for docketing is a comment on the above noted proposed rule (3150-A179) that I received via the regulations.gov website on 11/29/10.

Thanks,  
Carol

Received: from HQCLSTR01.nrc.gov ([148.184.44.76]) by TWMS01.nrc.gov  
([148.184.200.145]) with mapi; Tue, 30 Nov 2010 16:22:52 -0500  
Content-Type: application/ms-tnef; name="winmail.dat"  
Content-Transfer-Encoding: binary  
From: "Gallagher, Carol" <Carol.Gallagher@nrc.gov>  
To: Rulemaking Comments <Rulemaking.Comments@nrc.gov>  
Date: Tue, 30 Nov 2010 16:22:45 -0500  
Subject: Comment on Proposed Rule - Licenses, Certifications and Approvals  
for Material Licenses  
Thread-Topic: Comment on Proposed Rule - Licenses, Certifications and  
Approvals for Material Licenses  
Thread-Index: AcuQ1Lpmd1tLjkasROSt0Z3dP3Q87A==  
Message-ID:  
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Accept-Language: en-US  
Content-Language: en-US  
X-MS-Has-Attach: yes  
X-MS-Exchange-Organization-SCL: -1  
X-MS-TNEF-Correlator:  
<6F9E3C9DCAB9E448AAA49B8772A448C549CFDFF24C@HQCLSTR01.nrc.gov>  
MIME-Version: 1.0